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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.

Petitioner,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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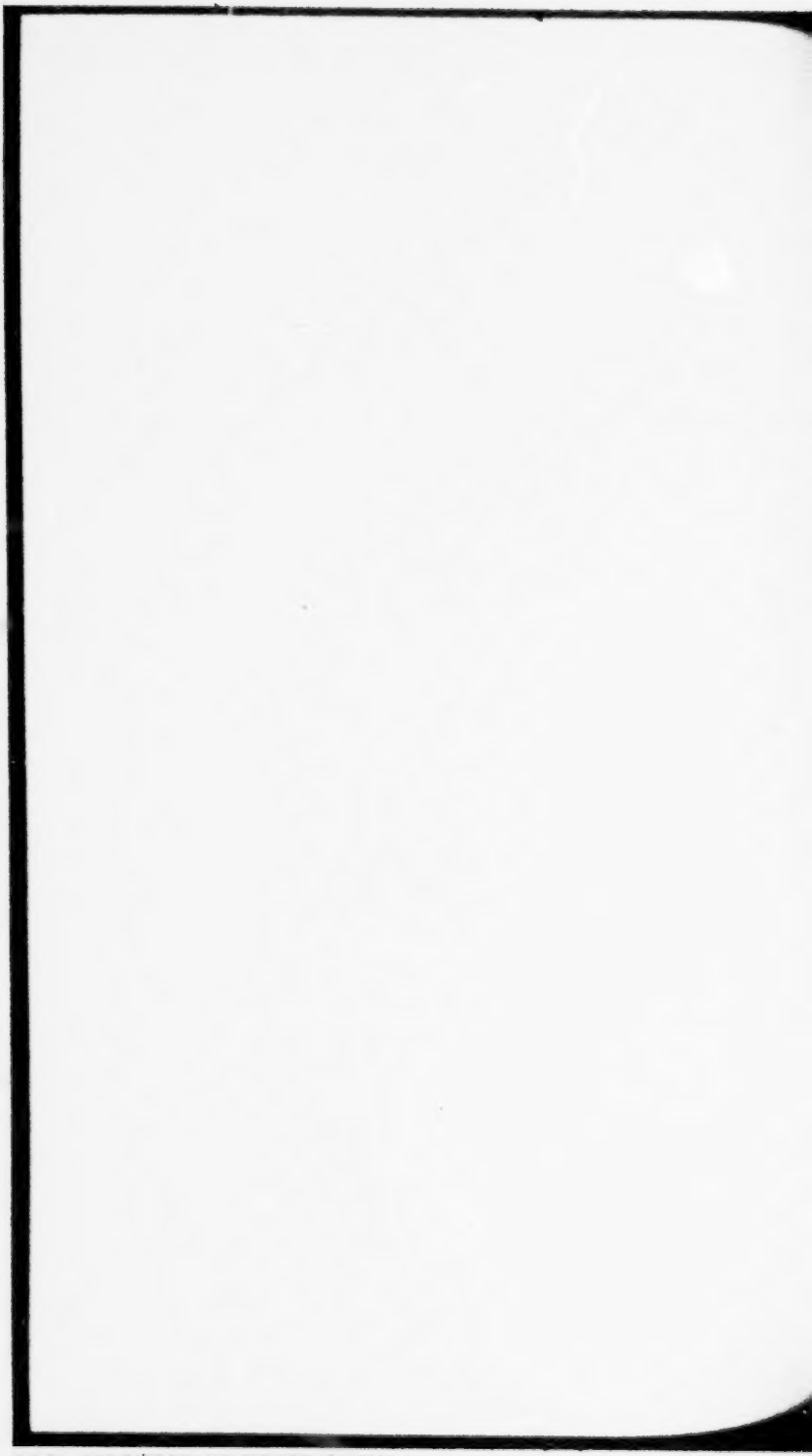

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Intra Bank, S.A., prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled proceeding on October 30, 1969; a timely motion for reargument was denied on February 19, 1970.

Opinions Below

Neither the Court of Appeals of the State of New York, nor the Appellate Division, First Department, wrote any opinion. The decision of the Court of Appeals affirming, without opinion, the judgment of the Appellate Division is reported in 25 N.Y. 2d 619; the decision of the Court of Appeals denying reargument and amending its remittitur is not yet reported; the decision of the Appellate Division affirming, without opinion, the orders of the Supreme Court of the State of New York, County of New York, is reported in 31 App. Div. 2d 721; the opinions (2) of the Supreme Court of the State of New York, County of New York, ("Special Term"), are not officially reported; they are reported unofficially in the New York Law Journal of June 14, 1968 and the New York Law Journal of September 13, 1968.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1969. Appendix A, *infra*. Petitioner's timely motion for reargument was denied by the Court of Appeals on February 19, 1970 and its timely motion to amend the remittitur of the Court of Appeals to set forth the Constitutional question determined by said Court adversely to petitioner was granted by the Court of Appeals on February 19, 1970. Appendix A, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

Question Presented

Was the petitioner denied due process of law by the New York Courts which confirmed, on the basis of affidavits and an incomplete record without any evidentiary hearing, a compromise between respondents of a claim of the Commodity Credit Corporation (CCC) against the New York business and property of petitioner held by

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the Superintendent of Banks of the State of New York ("Superintendent") where,

1) the proofs were in conflict as to whether or not the CCC had any valid claim to compromise and the Superintendent had originally rejected the alleged claim in its entirety;

2) there was an absence of any evidence to establish insolvency of petitioner and thus any basis for priority of CCC's alleged claim;

3) the proofs indicated that the compromise violated an agreement between the CCC, petitioner, and the governments of Qatar, Kuwait and Lebanon, which had been confirmed by a Lebanese court;

4) no opportunity for discovery was afforded to petitioner although duly requested?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, *infra* (pp. 55a-89a).

Statement*

This is a special proceeding commenced in the Supreme Court of the State of New York, County of New York, on February 16, 1968, for an order approving the compromise agreement between CCC and the Superintendent, as possessor of the New York business and property ("assets") of petitioner (42), pursuant to which the Superintendent accepted the CCC's filed claim in its entirety

* Figures in parenthesis refer to pages in the printed record on appeal in the Court of Appeals. References to the Superintendent's brief in the court below are indicated in parenthesis (S. br. p—).

(57). The basic assumption underlying the compromise is that the CCC had a valid claim which was entitled to priority over all claims of all other persons (21, 37, 498).

The said basic assumption is unproved in this record. Indeed, the evidence in the record negates such assumption. In addition, the evidence in this record indicates that the compromise violates an agreement between the CCC, petitioner, and the governments of Kuwait, Qatar and Lebanon, which was confirmed by a Lebanese Court. At a minimum a full-scale evidentiary hearing was mandated to resolve these complex and difficult questions. Certainly, the approval of the compromise by the New York courts violates elemental fairness and due process and is in apparent conflict with the decisions of this Court. The issues herein are of far-flung importance, involving relationships between the United States and the said Middle East governments.

The demand for an evidentiary hearing and for pretrial discovery was raised at Special Term at the pleading stage in the answering papers to the petition herein (85-90, 231), and on oral argument (30-1). See, Appendix C, *infra*. Special Term denied the same by approving the compromise. In the appellate courts, the question was raised in the briefs. As stated by the Court of Appeals amending its remittitur: (Appendix A, *infra*, p. 5a):

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of appellants under the Fifth and Fourfourth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this

> record, the failure to order a plenary hearing did not deny due process of law to appellants."

The facts which can be gleaned from the record are as follows:

1) Petitioner ("Intra") is an international bank, headquartered in Beirut, Lebanon (49). It had a New York branch (49), referred to hereafter as "Branch".

A "run" on the Beirut headquarters bank compelled Intra to suspend its Beirut operations on October 14, 1966. On October 15, 1966 the Superintendent, pursuant to Section 606 of the New York Banking Law, took possession of Intra's assets located in New York and an order of liquidation was entered (49). The Superintendent, as provided by law, published notice to file claims and fixed July 20, 1967 as the last day on which to file claims (49).

On July 18, 1967 CCC filed its claim in the sum of $21,010,766, which claim was expressly based on 53 letters of credit (50). These 53 letters of credit were apparently issued by Branch on instruction from Intra's head office in Beirut (234-5). CCC also claimed priority of payment of its claim pursuant to 31 U.S.C. Sec. 191 (119). CCC's filed proof of claim sets forth the basis thereof (115):

> "Commodity Credit Corporation is the holder of a total of fifty-three (53) irrevocable letters of credit under which the New York branch of Intra Bank, S.A., as the issuing bank, promised to pay sight drafts drawn upon it by Commodity Credit Corporation in an aggregate principal amount of $21,010,766.91, . . ."

Counsel for the State Banking Department summarized CCC's claim (267):

> "The claim filed by CCC which is sought to be compromised by the petition is based upon 53 so-called letters of credit issued to CCC".

On May 26, 1967, even before CCC formally filed its claim, the Superintendent advised the New York courts, that he would "reject the claim on the grounds, among others, that they [sic] are contingent and, accordingly, not acceptable in the liquidation proceedings in New York" (88-9).

The Superintendent thus recognized, as he was required to do, that CCC had no valid claim provable in the New York liquidation proceedings. Accordingly, on August 9, 1967, the Superintendent rejected CCC's claim in its entirety and in all respects (51, 21). The claim was not only wholly contingent on October 15, 1966 when the Superintendent took possession of the New York assets of Intra (49), it was contingent when the compromise agreement was executed on February 1, 1968 (62). Indeed, on this record CCC has no claim at all.

2) The record is incomplete and unsatisfactory as to the transactions which underlie the letters of credit (101). So far as the record shows, the transactions were substantially as follows:

American exporters acquired commodities or payment-in-kind export commodity certificates from CCC for sale and delivery to Lebanese, UAR and Cypriot recipients (114, 215-6). All but two of these transactions were consummated under the terms of an agreement between Libano-American Commodity and Supply Corporation (LACS), a Lebanese corporation (261), and CCC (260). Apparently LACS was an intermediary for Lebanese, UAR and Cypriot firms which were the actual recipients of the commodities (261, 215-6).

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Under the agreement between LACS and CCC, it was provided that CCC commodities would be made available to LACS in return for irrevocable letters of credit, calling for payment not earlier than three (3) years after the dates thereof, running in CCC's favor and to be provided through Intra (260-1, 215-6).

The Lebanese and other recipients opened, through their own banks (not Intra), letters of credit in favor of Branch for the full value of the commodities to be acquired by them plus freight (261). Pursuant to instructions issued by Intra from Beirut, Branch opened 53 letters of credit in favor of CCC, specifying delayed payment after a 36-month waiting period (261).

When Branch received the funds in New York derived from the letters of credit opened by the Lebanese and other recipients, with the knowledge and consent of CCC (445, 470-1), it transferred the funds to Intra in Beirut, less certain shipping and handling charges (261).

When Intra in Beirut received the funds from Branch it credited such funds to the account of LACS, less Intra's commissions (261-2). This deposit to LACS' account was blocked against LACS' obligations to CCC (444).

Apparently, although the record is not clear, since CCC has refused to produce the agreement between it and LACS, LACS could grant to the Lebanese and other recipients certain rebates (445) representing the difference between United States and Lebanese market prices for the commodities (262) or discounts or various expenses (326). The credit balance in the LACS account did not represent the amount due to CCC (444), and it appears that by reason of the LAC's-CCC agreement CCC was required to look first to LACS for payment and only upon default by LACS could CCC claim under the letters of credit (444, 454). So far as the record shows, CCC has made no effort to collect from LACS (446-7).

The face amount of the letters of credit issued by Branch would not be the amounts ultimately payable to CCC (215-6, 445-6, 455-6). At no time prior to the expiration of the 36-month waiting period could the amount ultimately payable under the letters of credit be ascertained (e.g. 132).

Schedules of the 53 letters of credit are set forth in the record (115-8, 215-6). The two earliest dates on the letters of credit are February 26, 1964 and August 24, 1964 (118). Twenty-one of the letters of credit bear dates between May 19, 1965 and December 8, 1965 (115-6). Thirty of the letters of credit bear dates between January 13, 1966 and September 9, 1966 (116-8). Each of the latter fifty-one letters of credit appear to be in substantially the same form (120-213).

The conditions precedent to liability on each of the letters of credit are:

a. The draft must be accompanied by CCC's written statement that the amount due for the commodities, plus interest, was not received by CCC within 36 months after delivery of the commodities. There is no evidence in this record that CCC presented any such written statement with respect to any draft or any letter of credit. The requirement of such statement supports the contention that CCC was required to look first to LACS for payment (446).

b. CCC must consent in writing to a reduction in the amount of the letter of credit for sums it receives for the account of the American exporter. There is no evidence in the record of compliance with this condition.

c. No draft would be honored if presented for payment earlier than three years from the respec-

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tive dates of the letters of credit. Hence, the earliest date on which any draft could be presented and be honored was February 1967 (118). Accordingly, it is obvious that CCC had not complied with the three-year condition precedent to liability on October 15, 1966 the date the Superintendent took possession of the New York assets of Intra (49). As of the date of the compromise agreement, February 1, 1968 (62), the three-year waiting period for presentation of drafts had elapsed only as to letters of credit numbered 184 and 4675, dated February 26th and August 24, 1964.

3) Intra was reorganized in the Lebanese Courts pursuant to Lebanese law (101). CCC filed its claim for the sum of $21,010,766 (the same claim as is involved herein) in the Lebanese reorganization proceedings and hence subjected itself to the jurisdiction of the Lebanese Courts (100, 103, 215-6, 234-5).

On October 11, 1967, during the course of the Lebanese reorganization proceedings, Intra and its four major creditors (the Government of Lebanon, Kuwait and Qatar and the CCC) entered into an agreement and attached protocol ("Beirut Protocol") in Beirut, Lebanon to reorganize Intra, to acquire shares in the reorganized bank and to provide for the payment of claims against Intra (217-30). The Beirut Protocol was thereafter ratified by a judgment of the Lebanese Court dated November 4, 1967 (457-61).

Under the Beirut Protocol the CCC agreed to accept stock for its claim (226):

> "Deposits in Lebanon in excess of LL 250,000 and also all deposits and *claims* of the Kuwait Government and Kuwait private accounts, Qatar Government and His Highness the Ruler of Qatar, the

> *Commodity Credit Corporation* and the Government of Lebanon *will be converted to common shares* in the Corporation." (Emphasis supplied.)

The conversion of CCC's claim into shares necessarily discharged CCC's claim unless such discharge was precluded by other express langauge of the Beirut Protocol. The only savings clause therein is the following (226):

> "This Protocol does not prevent CCC from pursuing its claims under United States laws against Intra Bank assets in New York and elsewhere in the United States. CCC will initially receive common stock in proportion to its full claim. It is agreed that CCC will surrender shares to adjust for proceeds that it may receive in implementation of a Court decision in the United States."

The foregoing exception or savings clause to discharge of CCC's claim can only be understood and properly construed in the light of the circumstances which gave rise to it and of the intent of the parties. The only evidence thereof in the record is the affidavit of John Asfour, Esq., a lawyer, who participated in the negotiation of the Beirut Protocol. Mr. Asfour stated in part (463-4):

> "That during those negotiations the representatives of the U. S. Commodity Credit Corporation endeavoured to assert its right of priority over all other creditors of Intra Bank in the U.S.A., which assertion was vehemently opposed by us as representing Intra Bank.
>
> "That in order to come to an agreement over this controversial issue, it was agreed that if the C.C.C. can establish their right of priority by a final judgment of an appropriate Court in the U.S.A. Intra Bank will submit to such final judgment. If this is

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not established in the aforesaid manner, the C.C.C. representatives accepted to become one of the mass of Creditors of Intra Bank without any right of preference.

"That in this sub-paragraph (e) the following quotations occur and when reflected with the terms orally agreed upon during the negotiations, the intention of the parties will crystallize into what was agreed upon.

"These are:

'This Protocol does not prevent CCC from pursuing its claims under United States Laws against Intra Bank assets in New York and elsewhere in the United States.'

and

'It is agreed that CCC will surrrender shares to adjust for proceeds that it may receive in implementation of a Court decision in the United States.'

"That by this it is clearly understood that pursuing claims under United States laws can only be done by a judicial pronouncement by a United States Court as *to the veracity of the assertion of the right of priority claimed by CCC and by no other means.*" (Emphasis supplied.)

The Courts below give no faith and credit whatsoever to the Lebanese judgment which binds CCC and also permitted CCC to repudiate and breach the Beirut Protocol. International implications of the failure of the Courts to give faith and credit to the Lebanese judgment are obvious, and by the same token it is inequitable and improper for the Courts to permit the CCC to act in contravention of its solemn covenants contained in the Beirut Protocol.

Intra requested the Court to permit it to conduct discovery so that the evidentiary facts could be adduced as an aid to the Court (105-6). Such relief was denied to Intra (14-18). It is submitted that only by such full-scale inquiry, including pre-trial discovery, and an evidentiary hearing, can sufficient facts be adduced so that the Court may be fully apprised in the premises for an intelligent and objective opinion of the probabilities of ultimate success should CCC's claim be litigated and an accurate determination as to the intent of the parties to the Beirut Protocol and its scope and effect.

Reasons for Granting the Writ

The New York courts have deprived Intra of millions of dollars and permitted the transfer thereof to CCC without any evidentiary hearing and without any reasonable opportunity for Intra to adduce the basic facts necessary for determination.

The "hearing" afforded by the New York Courts was a mere formality. No oral evidence was taken and no opportunity was afforded to Intra to elicit testimony by pre-trial discovery from the Superintendent or CCC. The entire matter was determined on the basis of affidavits and exhibits annexed thereto.

The critical evidence here was in the possession of the Superintendent or CCC or both. Neither produced it (95a-96a) and the New York Courts refused to compel either to produce it.

As a result the record is woefully inadequate. On the record herein, there can be no objective and intelligent appraisal of the probabilities of ultimate success as to CCC's claim should it be litigated or of the terms of the compromise as compared with the likely rewards of liti-

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gation. The inadequacy of the record no doubt accounts for the glaring inaccuracies in Special Term's first opinion which it sought to correct in its second opinion.

Due process mandates that the hearing may not be a mere formality as it was here. Where, as here, Intra was effectively denied the right to secure and present evidence material to the issues under investigation, there has been a denial of due process and infringement of Intra's constitutional rights under the Fifth and Fourteenth Amendments.[1]

This Court has previously noted[2] that the informed judgment necessary for approval of a compromise is lacking unless the Court has apprised itself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Basic is the need to compare the terms of the compromise with the likely rewards of litigation.

The New York Courts have paid lip service (Appendix A, *infra*, pp. 28a-30a) to due process and the fundamentals for approval of compromises, but that is all. There are missing here the basic facts necessary for any objective appraisal by the Courts. In brief:

1. The record does not disclose the value of what ICC is receiving. No one can tell the value of the blocks of stock and causes of action to be conveyed to CCC (66-7). Assets were simply bestowed upon CCC without any attempt to value them (21-2, 33-9, 41-84). Indeed, Special Term did not even seek to compare the value of the compromise with the likely rewards of litigation (Appendix A, *infra*, pp. 15a-54a).

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[1] *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930).

[2] *Protective Committee* v. *Anderson*, 390 U. S. 414 (1968).

2. The record is inadequate to value what CCC is giving up, if anything, under the compromise. It cannot be said on the record herein with any reasonable certainty that CCC has any valid claim, much less a claim entitled to priority. Inasmuch as CCC failed to offer any evidence of its contracts with the American exporters or of whether or not the exporters or anyone else made any advance payments to CCC or of whether or not the exporters assigned any of their rights to third parties, it is impossible to determine from the record the applicability and effect of the CCC's regulations, although the New York Courts did purport to apply and construe such regulations (Appendix A, pp. 18a-19a, 31a-33a).[3]

3. If we assume that CCC has a valid claim, its assertion of priority rests on proof of Intra's insolvency. Such proof is lacking here.

4. The record indicates that the compromise constitutes a breach by CCC of the Beirut Protocol (463-4). At a minimum, evidence on this issue should have been taken.

We turn now to a more detailed explication of the reasons for granting the writ.

A. Special Term stated that involved herein is an "extremely complicated transaction" (Appendix A, *infra,* p. 17a). The Superintendent conceded in the Court below (S. br. pp. 11 *et seq.*) that the issues herein were novel and difficult and that (S. br. p. 16) so far as he knows no Court has ever considered the rights and obligations created by the letters of credit herein. The Superintendent further conceded (S. br. p. 16) that so far as he knows no Court has ever construed the complex CCC regulations which may be involved herein. And finally the Su-

[3] CCC Regulation §§ 1488.8, 1488.15, 1488.16.

perintendent conceded (S. br. p. 16) that so far as he is aware no Court has ever considered the problem of the solvency of a local branch of an insolvent foreign bank for purposes of the federal priority statute.[4]

These circumstances mandate a full-scale plenary hearing with pretrial discovery. The exigencies here were such that the matter could not be flung off on an incomplete record consisting of affidavits.

B. The inadequacy of the record led Special Term into error after error. Thus, Special Term concluded that CCC's claim was fixed and matured on the date when the order of liquidation was entered, viz. October 15, 1966 (Appendix A, *infra,* p. 37a). That conclusion rested on the following erroneous assumptions and conclusions by Special Term:

a) CCC was not aware, when it agreed to accept 36-month letters of credit, that the New York branch of Intra would obtain the funds under the recipients' letters of credit as soon as the commodities were shipped to them (Appendix A, *infra,* p. 39a)—CCC admitted that it was fully aware (470-1, 445).

b) CCC was not aware that the New York branch of Intra transmitted the funds to Intra in Beiruit (Appendix A, *infra,* p. 39a)—CCC admitted that it was fully aware and consented thereto (470-1, 445).

c) The 36-month credit provision of the letters of credit was invalid under the Secretary of Agriculture's Credit Regulations GMS-3, Sec. 1488.8 (Appendix A, *infra,* p. 39a)—CCC expressly conceded that such conclusion was erroneous (471).

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[4] 31 U.S.C. §191.

[5] *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464 (1961).

Special Term apparently realized the tenuous nature of its conclusion that CCC's claim had matured as of October 15, 1966. So Special Term further ruled that CCC's claim would be entitled to priority under federal law if it matured prior to ultimate distribution of the assets (Appendix A, *infra*, p. 45a). That conclusion is in conflict with the decisions of this Court.[6]

The only claim filed by CCC was based on the letters of credit (114, 267). Special Term, obviously unsure that the compromise could be supported by the letters of credit, ruled that it could be sustained by a claim for restitution (Appendix A, *infra*, p. 38a). Special Term's ruling resting on a claim not filed is thus in conflict with the decisions of this Court.[7]

C. CCC, on this record, had no valid claim on the letters of credit provable in the liquidation proceedings, much less a claim entitled to priority under 31 U. S. C. 191. CCC's contention was that although contingent claims were not provable in the New York proceedings under New York law, nonetheless by virtue of Section 191, federal law overruled New York law and mandated payment of CCC's claim. Special Term agreed with this theory.

The letters of credit are of course, contracts, and whether federal or state law is applied, the result is the same. Every condition to a claim under the letters of credit must be strictly complied with and if any condition has not been strictly complied with the CCC has no claim at all under the letters of credit.[8]

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[6] e.g. *Massachusetts* v. *United States*, 333 U. S. 625, 626-7 (1948).

[7] *United States* v. *Marxen*, 307 U. S. 200, 205 (1938).

[8] 3 Williston on Contracts Sec. 676, p. 1951 (1936); *Anglo-South American Trust Co.* v. *Uhe*, 261 N. Y. 150, 156-7 (1933); *Cameron-Hawn Realty Co.* v. *Albany*, 207 N. Y. 377 (1913); *Brewster* v. *Kable News Co.*, 189 N. Y. 246, 249 (1942).

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The record does not disclose any compliance by CCC with any of the conditions of the letters of credit. CCC did not submit any written statements that the amount due under the letters of credit was not received by it within 36 months after delivery of the commodities (120-1, 446). The 36-month maturity period had not elapsed for maturity of drafts under the letters of credit and hence none could be honored (118).

Special Term read these conditions out of the letters of credit, and ruled that the 36-month waiting period was invalid (Appendix A, *infra*, p. 39a). Special Term's ruling was predicated on credit regulation GMS 3, Sec. 1488.8 (Appendix B, *infra*, pp. 38a-39a).

There is nothing in Section 1488.8 which in any wise strikes down the 36-month waiting period as invalid. That section reads in part:

> "If the *exporter* receives payment, in whole or in part, for or on behalf of the foreign importer of the principal value of the commodities exported under the credit arrangement prior to maturity of the credit period, *he* shall remit promptly to CCC such payment received plus interest for the actual credit period utilized." (Emphasis supplied.)

Section 1488.8 applies by its terms only to the exporter; it has no application to Intra, a bank. Hence, Special Term clearly erred in construing Section 1488.8 to strike down the 36-month waiting period in the letters of credit.

It is thus clear that CCC had no matured claim on the letters of credit as of the date the Superintendent took possession of Intra's New York assets. Even if it be assumed that CCC had a contingent claim on that date, nonetheless it was not a claim provable in these pro-

ceedings. It is legally immaterial whether the contingency relates to liability or amount.[9]

Special Term rejected the authority that contingent claims are not provable in the proceedings in reliance on *United States* v. *Knott*.[10] *Knott* is utterly inapposite and in any event if it has any applicability it is in conflict with *Massachusetts* v. *United States*.[11]

Knott involved a bail bond which was forfeited after the surety was taken over for liquidation. An obligation under such bail bond is a debt of record, matured and fixed in amount the moment the bail bond is issued, subject to defeasance by the occurrence of a condition subsequent. At bar, the CCC's claim is subject both as to existence and amount to conditions precedent.

As we have previously noted, the basic assumption underlying the compromise and the approval thereof (21, 37, Appendix A, *infra*, p. 27a) is that the CCC is entitled to priority of its entire claim. If we assume that CCC had a valid claim provable in the proceedings, nonetheless on this record it would not be entitled to priority.

CCC's claim for priority rests on 31 U. S. C. Sec. 191, which provides in substance that whenever any person indebted to the United States is insolvent, the debts due to the United States shall be first satisfied.

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[9] *Massachusetts* v. *United States*, 333 U. S. 625 (1948); *Varick Spring Corp.* v. *The Bank of United States*, 264 N. Y. 297 (1934); *Jacob Ruppert Realty Corp.* v. *Bank of United States*, 276 N. Y. 629 (1938); *cf. People* v. *Metropolitan Surety Co.*, 205 N. Y. 135 (1912).

[10] 298 U. S. 544 (1936).

[11] 333 U. S. 625 (1948).

But, proof of balance sheet insolvency is absolutely requisite to invoke the priority granted by Section 191.[12] However, the presumption is that Intra was solvent.[13]

This record will not sustain a finding of insolvency is the balance sheet sense or any other sense. The only statement of the condition of the New York branch of Intra in the record shows that it was not insolvent as of September 30, 1966 (93-4). (In this connection, $807,959 of Item 24 under liabilities (93-4) were amounts due to Intra in Beirut and were in effect capital of the New York branch.) Moreover, the bank premises were sold for some $15,250,000 less a mortgage thereon of about $5,500,000 (54) thereby augmenting the New York assets by some $9,500,000.

With respect to Intra's condition, on an overall basis, the United States in its brief below said (p. 9):

> "The events in Lebanon do not fully appear in the record."

The only evidence in the record as to Intra's financial condition is the statement in the Beirut Protocol that Intra's capital has been "totally lost" (219), an inconclusive and elliptical statement and without any reference to the date when it was lost.

Thus, Special Term's ruling that the CCC had a valid claim enforcible in the proceedings, and that CCC was entitled to priority, are in square conflict with the rulings of this Court.

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[12] *United States* v. *Oklahoma*, 261 U. S. 253 (1923); *United States* v. *Press Wireless, Inc.*, 187 F. 2d 294 (2 Cir. 1951).

[13] *O'Connor* v. *Gifford*, 117 N. Y. 275, 279 (1889); *Thomas* v. *Zakka*, 228 N. Y. 187 (1920).

D. Special Term for all practical purposes ignored the Beirut Protocol and the evidence relating thereto. The evidence in this record indicates that under the Beiruit Protocol the CCC could pursue United States assets of Intra providing that its right to priority thereto was determined by an adjudication on the merits. In short, the Beiruit Protocol was designed to prevent the CCC from obtaining an unfair advantage over the other parties thereto with respect to the United States assets of Intra. If the CCC could establish on the merits that it was entitled to priority against such United States assets, then the other parties agreed that the CCC could participate in the United States assets.

On the other hand, the other parties to the Beirut Protocol were not willing to permit the CCC to obtain United States assets of Intra by negotiation or compromise. After all that advantage would be too great. Moreover, there would always be the danger of a collusive settlement in the United States if the CCC would be permitted to obtain United States assets of Intra through compromise or other arrangement. A collusive settlement appears to be what happened here. After the Superintendent rejected CCC's claim in its entirety, he did an about face and compromised the claim by allowing it in its entirety. The method by which the compromise was achieved clearly shows this collusion. The Superintendent in effect agreed that he would hand over Intra's assets to CCC, if CCC would permit payment in full of certain favored creditors (65-68).

The determination of the New York State Courts does not constitute a judicial determination on the merits that the CCC is entitled to priority with respect to its claim against Intra's New York assets. Indeed, on the record herein no such determination could possibly be made. The compromise thus appears to be in conflict with both

the Beirut Protocol and the Lebanese judgment confirming the same.

The CCC has been permitted to take advantage of the Beirut Protocol and Lebanese judgment to obtain a large stock interest in Intra, and at the same time has been permitted to repudiate the same. That does not accord with due process and constitutes an unconstitutional breach by the United States of its contractual obligations.[14]

Certainly, on the state of this record, and in view of the grave international implications of any breach by CCC of the Beirut Protocol, the least that the New York Courts should have done was to set this issue down for a plenary hearing after full discovery.

E. Special Term denied Intra any opportunity to obtain discovery and thus to adduce the requisite evidence to flesh out the record so that a reasonable determination could be made. The absence of a plenary hearing coupled with a denial of any discovery, simply denied to Intra its day in Court. Special Term rationalized the Superintendent's about face from complete rejection of the CCC claim to complete acceptance thereof on the notion that the transactions were complex and there was "necessity to ferret out all the essential facts" (Appendix A, *infra*, p. 53a). But that is precisely what was not done here.

Inasmuch as this is a special proceeding under New York law, all motions for discovery or otherwise must be made returnable at the time of the petition for approval of the compromise.[15] Petitioner could obtain discovery only with leave of court.[16]

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[14] *Perry* v. *United States*, 294 U. S. 330 (1935); *Nortz* v. *United States*, 294 U. S. 317 (1935).

[15] CPLR Rule 406.

[16] CPLR Sec. 408.

Thus Intra's application for leave to obtain discovery was required to be and was made returnable at the same time as the petition for approval of the compromise. Accordingly, when Special Term approved the compromise, it necessarily denied to petitioner any discovery whatsoever.

CONCLUSION

In sum, we here have a case denying fundamental procedural due process to petitioner. Millions of dollars of Intra's funds have been handed over to the CCC without any evidentiary hearing and without any disclosure.

The decision of the New York Courts appears to be in conflict with decisions of this Court. The New York Courts have decided important constitutional questions and questions of federal law in such a way as to unsettle and inject uncertainty into the rights and obligations of the CCC and of banks which issue letters of credit with respect to the CCC's export program.

The sweep of the decision cuts across a very substantial area of commercial activity with respect to the CCC's foreign commodity program. The regulations of the CCC have been construed in a manner utterly inconsistent with the language thereof. Solemn international commitments have been breached and the New York State Courts have sanctioned this compromise in the face of an international agreement which appears to mandate a contrary result.

The State Courts have thus decided federal questions of substance not heretofore determined by this Court and have decided other federal questions of substance in a manner probably not in accord with applicable decisions of this Court. This Court's ultimate power to determine

federal questions and constitutional questions should be here exercised.

Dated: New York, N. Y.

Respectfully submitted,

SAMUEL N. GREENSPOON
Counsel for Petitioner
201 E. 42nd Street
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Of Counsel:

SAMUEL N. GREENSPOON, Esq.
WILLIAM MELLON EATON, Esq.
JOHN HOUSER, Esq.

[APPENDIX FOLLOWS]

APPENDIX A

Judgment of Court of Appeals Denying Reargument and Amending Remittitur, dated February 19, 1970

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Nineteenth day of February A.D. 1970.

Present,
HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 111

IN THE MATTER
of
the Petition of FRANK WILLE, as Superintendent of Banks of the State of New York, for approval pursuant to §618(1) of the New York Banking Law of the Agreement of Compromise &c. Intra Bank, S.A., &ors.,

Appellants,

vs.

FRANK WILLE, Superintendent &c.,

Petitioner-Respondent,

and

UNITED STATES OF AMERICA &ors.,

Respondents.

Appendix A

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having heretofore been made upon the part of the appellant Intra Bank, S.A., herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants."

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEABON KIMBALL
Deputy Clerk

Appendix A

Remittitur of Court of Appeals

No. 342
(1969)

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

1. No. 342. 69

IN THE MATTER

of

the Petition of FRANK WILLE, as Superintendent of Banks of the State of New York &c. Intra Bank, S.A., & ors.,

Appellants,

FRANK WILLE, Superintendent &c.,

Petitioner-Respondent,

and

Appendix A

UNITED STATES OF AMERICA,
Respondent,

MIDDLE EAST AIRLINES & ORS.,
Defendants.

BE IT REMEMBERED, That on the 14th day of July in the year of our Lord one thousand nine hundred and sixty-nine, Intra Bank, S.A., & ors., the appellants in this cause, came here unto the Court of Appeals, by Eaton & VanWinkle, & ors., their attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Frank Wille, as Superintendent of Banks &c., the petitioner-respondent, and United States of America, the respondent—in said cause, afterwards appeared in said Court of Appeals by Hughes, Hubbard, Blair & Reed, and Robert M. Morgenthau, their attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Samuel N. Greenspoon, of counsel for the appellant Intra Bank, S.A., and by Mr. Peter J. Malloy, Jr., of counsel for the appellants American International Underwriters Corporation, & ors., and by Mr. William E. Jackson, of counsel for the appellant Chase Manhattan Bank, and by Mr. Powell Pierpoint, of counsel for the petitioner-respondent, and by Mr. Lawrence W. Schilling, of counsel for the respondent United States of America, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the

same is hereby affirmed, with costs. Question certified not answered as unnecessary. And thereafter on February 19, 1970 a motion for reargument having been denied and a motion to amend the remittitur having been granted, this remittitur is hereby amended by adding thereto the following: Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, &c., as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Appendix A

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, OCTOBER 30, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.

Decision of Court of Appeals, dated October 30, 1969

342. MATTER OF WILLE, pet-res (United States, res; Middle East Airlines, def)—Order affirmed, with costs. Question certified not answered as unnecessary.

No opinion. All concur.

BLEED THROUGH, POOR COPY

Appendix A

Order of Appellate Division Granting Leave to Appeal to Intra Bank, S. A.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 6th day of March, 1969.

Present:

Hon. Samuel W. Eager,
Justice Presiding,
Louis J. Capozzoli,
George Tilzer,
Owen McGivern,
James B. M. McNally,
Justices.

IN THE MATTER

of

The Petition of FRANK WILLE, as Superintendent of Banks of the State of New York, for approval, pursuant to §618(1) of the New York Banking Law, of the Agreement of Compromise between petitioner and the Commodity Credit Corporation, an agency and instrumentality of the United States of America.

INTRA BANK, S. A., AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE and REASSURANCE COMPANY, S. A. L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, AMERICAN LIFE INSURANCE COMPANY and THE CHASE MANHATTAN BANK (National Association),

Respondents-Appellants,

against

Appendix A

FRANK WILLE, Superintendent of Banks of the State of New York,

Petitioner-Respondent,

and

UNITED STATES OF AMERICA,

Respondent-Respondent.

The respondent-appellant Intra Bank S. A. having moved for reargument and upon reargument reversing the final orders of the Supreme Court, New York County, entered June 24, 1968 and September 17, 1968 and dismissing the proceedings herein or setting this cause down for a full-scale evidentiary hearing, or in the alternative granting leave to appeal to the Court of Appeals from this Court's order dated December 17, 1968, which affirmed the said orders of the Supreme Court, New York County, and said motion having duly come on to be heard,

Now, on reading and filing the said notice of motion dated January 13, 1969, the affidavit of John G. Houser, Esq., sworn to January 13, 1969, the record on appeal herein, and the order of this Court dated December 17, 1968, in support of said motion, and the memoranda in opposition thereto, and due deliberation having been had thereon, and upon filing the memorandum decision of this Court dated February 24, 1969, it is

ORDERED, that the said motion for reargument be and the same hereby is denied; and it is further

ORDERED, that the said motion of respondent-appellant, Intra Bank, S. A. for leave to appeal to the Court of

BLEED THROUGH POOR COPY

Appendix A

Appeals be, and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, to wit:

Were the orders of the Supreme Court, New York County, entered June 24, 1968 and September 17, 1968, order of this Court entered December 17, 1968, properly made?

Enter:

SAMUEL W. EAGER

Order of the Appellate Division Granting Leave to Appeal to American International Underwriters Corporation, *et al.*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 6th day of March 1969.

Present:

Hon. Samuel W. Eager,
Justice Presiding,
" Louis J. Capozzoli,
" George Tilzer,
" Owen McGivern,
" James B. M. McNally,
Justices.

[SAME TITLE.]

The above named respondents-appellants American International Underwriters Corporation, American Inter-

national Underwriters Mediterranean, Inc., Middle East Assurance and Reassurance Company S. A. L., Firemen's Insurance Company of Newark, New Jersey and American Life Insurance Company having moved for reargument, or in the alternative for leave to appeal to the Court of Appeals from the order entered in the office of the Clerk of this Court on December 17, 1968,

Now on reading and filing the papers in support of and in opposition thereto; and all the papers upon which the appeals were heard; and due deliberation having been had thereon; it is

ORDERED, that the said motion for reargument be, and it hereby is denied; and it is

FURTHER ORDERED, that the said motion for leave to appeal to the Court of Appeals be, and it is hereby granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, to wit:

> Were the orders of the Supreme Court, New York County, entered June 24, 1968 and September 17, 1968 order of this Court entered December 17, 1968, properly made?

Enter:

SAMUEL W. EAGER

Appendix A

Order of Appellate Division Granting Leave to Appeal to The Chase Manhattan Bank

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 6th day of March 1969.

Present:

Hon. Samuel W. Eager,
Justice Presiding,
" Louis J. Capozzoli,
" George Tilzer,
" Owen McGivern,
" James B. M. McNally,
Justices.

[Same Title]

The above named respondent-appellant The Chase Manhattan Bank (National Association) having moved for leave to appeal to the Court of Appeals from the order of this Court enterd herein on December 17, 1968, affirming the orders entered in the office of the Clerk of the County of New York on June 24, and September 17, 1968,

Now on reading and filing the papers in support of and in opposition thereto; and all the papers upon which the appeals were heard, and due deliberation having been had thereon; it is

Ordered, that the said motion for leave to appeal to the Court of Appeals be, and it is hereby granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, to wit:

Were the orders of the Supreme Court, New York County, entered June 24, 1968, and September 17, 1968, affirmed by order of this Court entered December 17, 1968, properly made?

Enter:

Samuel W. Eager

Appendix A

Decisions of Appellate Division Denying Re-argument and Granting Leave to Appeal

(N. Y. L. J., February 26, 1969.)

By Eager, P. J.; Capozzoli, Tilzer, McGivern and McNally, JJ.:

M-93 Matter of Wille (Wille)—M-144: Motions for re-argument denied on the ground that nothing new is presented justifying a reconsideration of the matter by this court. That portion of the motions seeking leave to appeal to the Court of Appeals is granted. Settle orders on notice.

M-135: Motion for leave to appeal to the Court of Appeals granted. Settle order on notice.

Appendix A

Order of Affirmance Appealed From to Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 17th day of December, 1968.

Present:

Hon. Samuel W. Eager,
Justice Presiding,
" Louis J. Capozzoli,
" George Tilzer,
" Owen McGivern,
" James B. M. McNally,
Justices.

[Same Title]

Separate appeals having been taken to this Court by respondent-appellant Intra Bank, S. A., by respondent-appellant The Chase Manhattan Bank (National Association); and by respondents-appellants American International Underwriters Mediterranean, Inc., Middle East Assurance and Reassurance Company S. A. L., Firemen's Insurance Company of Newark, New Jersey and American Life Insurance Company from an order of the Supreme Court, New York County, entered on the 24th day of June, 1968, granting petitioner's motion for approval of a certain agreement of compromise and directing implementation thereof; and by respondent-appellant Intra Bank, S. A., from so much and such part of an order of said Court, entered on the 17th day of September, 1968, as adheres to the original decision rendered by said Court in the aforesaid order; and said appeals having been argued by Mr. John G. Houser, of counsel for respondent-

appellant Intra Bank, S. A., by Mr. Peter J. Malloy, Jr., of counsel for respondents-appellants American International Underwriters Corporation, American International Underwriters Mediterranean, Inc., Middle East Assurance and Reassurance Company S. A. L., Firemen's Insurance Company of Newark, New Jersey and American Life Insurance Company; by Mr. William E. Jackson, of counsel for respondent-appellant The Chase Manhattan Bank (National Association); by Powell Pierpoint, of counsel for petitioner-respondent Frank Wille, Superintendent of Banks of the State of New York; and by Lawrence W. Schilling, of counsel for respondent-respondent United States of America; and due deliberation having been had thereon,

It is hereby unanimously ordered that the orders so appealed from be and the same are hereby affirmed with $50 costs and disbursements to the petitioner-respondent and respondent-respondent, payable out of the estate funds in the hands of the Superintendent of Banks.

Enter:

Hyman W. Gamso,
Clerk

Appendix A

Decision of Affirmance by Appellate Division

(N. Y. L. J., December 18, 1968.)

By EAGER, J. P.; CAPOZZOLI, TILZER, MCGIVERN and MCNALLY, JJ.:

13981-13982. Matter of Intra Bank, S. A., res-ap (Wille, pet-res; United States of America, res-res)—Order entered June 24, 1968, unanimously affirmed with $50 costs and disbursements to the petitioner-respondent and respondent-respondent, payable out of the estate funds in the hands of the Superintendent of Banks. No opinion. Order filed.

Opinion of Special Term Dated September 16, 1968

SUPREME COURT
NEW YORK COUNTY
Special Term—Part I

[SAME TITLE]

HECHT, J:

Intra Beirut moves for an order, pursuant to CPLR Rule 2221, granting leave for reargument or rehearing of the order of this court entered June 24, 1968, granting the Superintendent's motion for an order approving the agreement of compromise between him and Commodity Credit Corporation ("CCC"). The motion is made on the ground

that the court has misapprehended and assumed facts with respect to certain matters on which it relied in granting said motion.

Movant has not given any persuasive reasons for not disclosing the facts which were known or available to it prior to the hearing on March 27, 1968, on the Superintendent's petition for approval of the compromise. However, the Superintendent and CCC have waived any objection to this defect, on condition that the movant agrees to take an appeal from any adverse order herein within five days, and to perfect such appeal simultaneously with the appeal from the foregoing order of June 24. Movant has agreed to this condition.

Accordingly, in order to have all the facts available on appeal, the court will exercise its discretion by granting the motion for reargument and rehearing, on the express condition that movant complies with the foregoing conditions in appealing from the instant order adhering to the original determination. In the event of movant's failure thus to expedite its appeal, the Superintendent may enter an *ex parte* order denying the motion for reargument and rehearing.

The Court's Previous Determination

The Court aproved the Superintendent's application on the ground that there was a sufficient showing of the probability of ultimate success of CCC's claim to priority of payment out of the assets of Intra NY to justify approval of the settlement, which provided for payment of all other valid claims in full out of such assets, and payment of the balance to CCC in partial liquidation of its claim. *TMT Trailer Ferry* v. *Anderson,* 390 U. S. 414; *Shielcrawt* v. *Moffet,* 59 N. Y. S. 2d 619, 621 (not officially reported);

Zenn v. *Anzalone,* 17 Misc. 2d 897. This conclusion was based on two independent reasons, either of which was sufficient to sustain it:

1. "The claim of CCC does not depend on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money 'under such circumstances that in equity and good conscience [it] ought not to retain it' (*Pink* v. *Title Guar. & Trust Co.,* 274 N. Y. 167, 173), and which Intra NY 'is obliged by natural justice and equity to refund' (*Bayne* v. *United States,* 93 U. S. 642, 643). That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt, without recourse to the letters of credit (*First Nat. Bank* v. *Mott Iron Works,* 258 U. S. 240, 241)."

2. Even if CCC is remitted to claim on its letters of credit, it could still show substantial probability of success if the claim would mature and become fixed in amount prior to ultimate distribution of the assets. *Matter of Phillips,* 196 App. Div. 175 (1st Dept.), aff'd 232 N. Y. 559; *United States* v. *Knott,* 298 U. S. 554.

None of the facts presented by movant affect the second reasons discussed above. It alone is sufficient to justify adhering to the original decision. However, in order that this extremely complicated transaction may be fully understood, this opinion will indicate why the new facts adduced will not alter the conclusion based on the first reason set forth above.

The New Facts

1. The previous opinion of June 14, 1968 emphasized "that CCC was not aware, when it agreed to issue these

thirty-six-month letters of credit to ADM that Intra NY would obtain the money immediately upon shipment of the wheat"; and that "it would be shocking to all concepts of justice and reason to hold that, after Intra Beirut had lost, dissipated or misappropriated these moneys, CCC was remitted to share in a pro rata distribution of the assets of the insolvent Intra Beirut, to whom the money had been transferred without its knowledge or authority."

It now appears that some representative of CCC did have full knowledge of the receipt by Intra NY of the proceeds of the grain and of the transmittal of these proceeds to Intra Beirut.

In writing an opinion, a court necessarily emphasizes all of the facts which seem pertinent. It does not follow that each one of those facts is necessary to reach the result. In the case at bar, my conclusion would have been no different even if the facts relative to the knowledge on the part of CCC's representatives had been disclosed on the original hearing.

The Secretary of Agriculture issued Credit Regulations G.M.S. 3 pursuant to the authority of the statute creating CCC, and the transactions herein were all made pursuant to those regulations. One of those sections provides: "Section 1488.8 Advance payment. If the exporter receives payment, in whole or in part, for or on behalf of the foreign importer of the principal value of the commodities exported under the credit arrangement prior to maturity of the credit period, he shall remit promptly to CCC such payment received plus interest for the actual credit period utilized."

I read this section as an unequivocal mandate that, when payments were made by the importers, for the grain, such payments were to be turned over promptly to CCC

in reduction of the amount due to it under the letters of credit. Here, where the importers had paid for the grain in advance by the payment to Intra NY by the American banks of the letters of credit which they had guaranteed for the importers' Lebanese banks, those amounts should have immediately been turned over to CCC when the grain was exported.

A construction of the regulation authorizing Intra NY to retain or dispose of the moneys thus deposited with it would conflict with the policy of the statute creating CCC, of preserving its capital for the purpose of stabilizing farm prices and assisting in maintaining and distributing adequate supplies of agricultural commodities. *Rainwater* v. *United States,* 356 U. S. 590, 591-2, see also opinion below, 244 F. 2d 20, 30-1 (8 Cir.), where the Court said:

> "The Commodity Credit Corporation is actually an instrumentality of the United States 'within the Department of Agriculture'. 15 U.S.C.A. § 714. Its entire original capital of $100,000,000.00 was supplied by the United States. 15 U.S.C.A. § 714e. The Secretary of the Treasury must make an annual appraisal of the net worth of Commodity Credit Corporation and if the net worth is less than $100,000,000.00 the treasury must restore the amount of capital impairment. 15 U.S.C.A. § 713a-1. If the appraisal indicates an excess, the treasury receives such excess. 15 U.S.C.A. § 713a-2. Commodity Credit Corporation is authorized to borrow up to $14,500,000,000.00 on the credit of the United States to carry out its statutory programs of making loans on agricultural commodities. 15 U.S.C.A. § 713a-4. * * * As stated by the Supreme Court in Marcus v. Hess, supra, 'these funds are as much in need of protection from fraudulent claims as any

> other federal money and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution'."

The United States cannot be bound by any act of its employees in conflict with that policy. *Sutton* v. *United States,* 256 U. S. 575, 578-581; *Pan American Co.* v. *United States,* 273 U. S. 456, 501-503, 508-509; *Mammouth Oil Co.* v. *United States,* 175 U. S. 13, 34-35; *Heckman* v. *United States,* 224 U. S. 413, 446. As was said by Brandeis, J., in *Sutton, supra,* at pp. 579, 580:

> "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated. See *Bradley* v. *United States,* 98 U. S. 104, 113, 114. Those dealing with him must be held to have had notice of the limitations upon his authority.
>
> • • •
>
> "It is contended that since the contract provided that the government 'inspectors will keep a record of the work done,' since their estimates were relied upon by the contractor, and since by reason of the inspector's mistake the contractor was led to do work in excess of the appropriation, the United States is liable as upon an implied contract for the fair value of the work performed. But the short answer to this contention is that since no official of the Government could have rendered it liable for this work by the express contract, none can by his acts or omissions create a valid contract implied in fact."

Nor can such public policy be thwarted by the application of the doctrines of estoppel, ratification or laches.

American Surety Co. of New York v. *United States,* 112 F. 2d 903, 906 (10 Cir.); *Butte A. & P. Ry. Co.* v. *United States,* 61 F. 2d 587, 590 (9 Cir.).

Movant argues that the money paid by the importers should have been kept intact because rebates might have to be made to the importers, pursuant to the CCC policy of making the price of the grain in Lebanon competitive. It would hardly be necessary to hold the entire amount due to CCC as security because a small fraction thereof might have to be refunded to the importers. Certainly, CCC was a far better credit risk for this small amount than either the importers or Intra NY for the $20,000,000 involved here.

The importers here were representd by Lebano-American Commodity and Supply Corporation ("LACS"). Movant quotes a cable from the chairman of Intra Beirut, which says: "The LACS deposit was Intra's inducement to issue the letters and was a blocked deposit against the obligations to the CCC but the specific debits and credits were the business of LACS and Intra and were not the business of CCC."

It is immaterial how Intra Beirut treated this deposit as an internal matter. The inescapable fact is that Intra NY had received payment for this wheat before it issued the letters of credit to CCC.

It is worth nothing, however, that Intra Beirut's interest in this matter was not just that of a banking agent. The report of Cooper Bros., who made a worldwide audit of Intra Beirut at the request of the Minister of Finance of Lebanon, said that on April 14, 1964, an agreement was entered into between Intra Beirut and the two principals of LACS, "whereby profits, apparently intended to arise from the investment of the proceeds of the sale of

the wheat, would be shared (after interest and expenses) equally by the three partners," and that "advance payments on account of those profits totalling $363,320 had been made on 14th October 1966."

Under the circumstances, while accepting the assumption of facts recited in the Government's affidavit, I do not accept its assumption of law "that the transmittal did not in and of itself violate applicable statutes and regulations." The Government cannot, by a mistaken assumption or concession as to the law, direct the court to an erroneous legal conclusion. *Cf. Massachusetts* v. *United States,* 333 U. S. 611, 624, *et seq.*

The Lebanese Protocol of October 11, 1967

On December 15, 1966, Intra Beirut wrote to CCC, confirming that it considered the whole amount of approximately $21,000,000 outstanding on the letters of credit, plus accrued interest, "as a liability of Intra Beirut." On the next day, CCC's Controller acknowledged this letter, and wrote: "As stated in our discussions, I appreciate the merits of your view that in the event of Intra Bank as a whole reopening on an unrestricted basis, the C.C.C. should look to Intra Bank, Beirut and not Intra Bank, New York for the settlement of these letters of credit. Upon my return to Washington I shall endeavour to obtain the agreement of other officials of the department to this arrangement and shall so recommend to them."

Movant relies on this as an agreement by CCC to substitute Intra Beirut as its debtor for Intra NY. It is doubtful, in the light of the cases discussed above, whether anyone in CCC would have the right to release Intra NY from its liability on the letters of credit, in consideration for the assumption of such liability by

Intra Beirut. But, in any event, the short answer is that the Controller's letter made it clear that he had no such authority but would endeavor to obtain the agreement of higher officials, and that agreement was never forthcoming.

It may be added that the assumption of liability by Intra Beirut would not furnish any consideration for releasing Intra NY from its liability. Where a debtor conveys property while he is insolvent, or where the conveyance renders him insolvent, a creditor, even though his claim has not matured, could set aside the conveyance or have the court "make any order which the circumstances of the case may require." Debtor and Creditor Law, §279. Since the transfer of the proceeds of the New York banks' letters of credit by Intra NY to Intra Beirut rendered the former clearly insolvent, CCC could, under the foregoing section of the Debtor and Creditor Law, have become a creditor of Intra Beirut as well as Intra NY.

It should be noted further that the approval given to ADM's credit application was subject to the submission "of an acceptable assurance of payment from a bank in the United States" (see Item 2 under Facts in the decision of June 14). Under the cases cited above, no representative of CCC could waive this requirement by releasing Intra NY.

By a protocol dated October 11, 1967 between the major creditors of Intra Beirut (including CCC) and Kidder, Peabody & Company, a reorganization of Intra Beirut was effectuated. Each creditor agreed to accept certain shares of common stock in the reorganized bank, in payment of its claim.

This protocol provided in ¶3(e): "This Protocol does not prevent CCC from pursuing its claims under United

States laws against Intra Bank assets in New York and elsewhere in the United States. CCC will initially receive common stock in proportion to its full claim. It is agreed that CCC will surrender shares to adjust for proceeds that it may receive in implementation of a Court decision in the United States. Such adjustment in shares shall result in CCC finally holding that number of shares it would have received had its original claim been equal to the total of its claim against Intra Bank reduced by the amounts collected from United States assets. Should CCC recover from Intra Bank assets in the United States a total amount in excess of its total original claim, it will pay such excess recovery to the Corporation."

Movant submitted an affidavit by a Lebanese lawyer to the effect that by this clase "it is clearly understood that pursuing claims under United States laws can only be done by a judicial pronouncement by a United States Court as to the verified assertion of the right of priority claimed by CCC and by no other means." Movant argues therefore that CCC had no right to enter into the instant agreement of compromise which, so movant claims, is not "a Court decision in the United States."

It is unnecessary to consider what rights, if any, the other parties to the portocol may have under Lebanese law to avoid its obligations to CCC, on the ground that CCC has violated those provisions by asserting its rights against Intra NY's assets on the basis of my decision of June 14. CCC's right to participate in the assets of Intra NY is governed not by Lebanese law, but either by New York law or by Federal law. See *United States* v. *L. N. White and Company*, 359 F. 2d 703, 714, note 16 (2 Cir.) and cases cited therein; *Carghill, Incorporation* v. *Commodity Credit Corporation*, 275 F. 2d 745, 751 (2 Cir.). Under either law, it is not necessary that CCC

pursue its claims against Intra NY's assets to judgment. It may receive payment of its claim in implementation of a court decision authorizing a compromise of the claim, which is just as effective for this purpose as a final adjudication would be. *TMT Trailer Ferry* v. *Anderson, supra; Shielcrawt* v. *Moffett, supra; Zenn* v. *Ansalone, supra.*

Movant points out that the previous decision was incorrect in stating that the controversy as to who should receive the fund is "between CCC on the one hand, and shareholders of Intra NY and creditors who claim in subordination to them on the other hand." It is true, as pointed out, that the controversy is between CCC and the creditors of Intra Beirut rather than its shareholders, since the latter has been recognized for the benefit of its creditors. However, creditors of Intra NY are entitled to payment out of its assets before they are turned over to Intra Beirut for payment to its creditors.

For all of the foregoing reasons, the original decision is adhered to. The motion for reargument or rehearing is granted subject to the conditions previously stated. Order Signed.

Dated: September , 1968

W. C. H.
J.S.C.

Appendix A

Opinion of Special Term Dated June 12, 1968

SUPREME COURT
NEW YORK COUNTY
SPECIAL TERM—PART I

[SAME TITLE]

HECHT, J.

Intra Bank, S. A. ("Intra Beirut"), a banking corporation organized under the laws of the Republic of Lebanon, was licensed to maintain a branch in New York City ("Intra NY"). On October 15, 1966, the Superintendent of Banks took possession of the business and property of Intra NY and determined to liquidate its affairs, pursuant to section 606 of the Banking Law.

The time for filing claims expired on July 20, 1967. The Superintendent allowed claims aggregating $913,656. He rejected the following claims:

United States, on behalf of	
Commodity Credit Corporation ("CCC")	$21,010,766
Claims involved in actions pursuant to Banking Law, § 625	5,850,918
	$26,861,684

The Superintendent has available quick assets of $1,532,810, which are subject to the expenses of administration. The other assets include (a) the building at 680 Fifth Avenue, presently subject to a sale on sealed bids authorized by this Court, on which the anticipated net

realization is approximately $3.5 million; and (b) causes of action against various banks, as to which no estimate of anticipated realization is made.

The Superintendent has submitted for approval a proposed Agreement of Compromise with the United States, pursuant to section 618(1) of the Banking Law. This provides, in substance, that the Superintendent

(a) accept CCC's claim as valid;

(b) will pay in full, with maximum statutory interest, all other valid claims against Intra NY (and all costs of administration and liquidation) before making payment on account of CCC's claim;

(c) will assign to the United States all his rights in the causes of action held by him.

The Superintendent has been advised and believes that, if the agreement is approved, he will be able to pay all other valid claims in full with maximum statutory interest, with a balance remaining to be paid to the United States. Moreover, the latter will assume all of the costs and other burdens of the many pending litigations. If the CCC claim be upheld as valid, and if it be found entitled to the statutory priority, there will be nothing left for payment to other creditors.

The original priority statute was enacted in March, 1797, and was subsequently known as R.S. § 3466. It is now embodied in 31 U.S.C. § 191, and applies in all cases of insolvency. So far as is material here, it provides: "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first statisfied * * *."

"[CCC] shall have all the right, privileges, and immunities of the United States with respect to the right to

priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors. The Corporation may assert such rights, privileges, and immunities in any suit, action or proceeding" (15 U.S.C. § 714[b], subd. e).

The Superintendent recommends approval of the compromise. Notice thereof was given to all of those involved in the Superintendent's pending litigations, to all persons whose claims were rejected, and to Intra Beirut. A hearing was held on March 27.

The settlement is opposed by Intra Beirut and by Chase Manhattan Bank. Both contend that CCC's claim is not valid, and that if it is invalidated, there will be a surplus after payment to New York creditors. In that event, Intra Beirut points out that its stockholders would be entitled to the surplus (Banking Law, § 606[4], subd. b); Chase argues (a) that the Superintendent would be precluded from pursuing his actions against it to recover funds claimed to be due to Intra NY; (b) its right to set off balances held by it in New York against debts owed to it in Beirut would be advantaged.

The duty of a court in passing upon proposed compromises in an insolvency proceeding was recently summarized by WHITE, J., in *TMT Trailer Ferry* v. *Anderson,* 20 L. ed 2d 1, 9-10):

> "Compromises are 'a normal part of the process of reorganization' *Case* v. *Los Angeles Lumber Prods. Co., Ltd.,* 308 U. S. 106, 130. In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive

the 'informed, independent judgment' of the bankruptcy court. *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436. * * * There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

In *Shielcrawt* v. *Moffett,* 59 N. Y. S. 2d 619, 621 (not officially reported), BOTEIN, J. said:

"In weighing the benefits held forth by the agreement of settlement against benefits dependent on the likelihood of recovery upon the plaintiffs' cause of action, the courts cannot be expected to balance the scales with the nicety of an apothecary. The very object of a compromise 'is to avoid the determination of sharply contested and dubious issues' *In re Prudence Co.,* 2 Cir., 98 F. 2d 559, 560, cert. den. *sub nom. Stein* v. *McGrath,* 306 U.S. 636 (1939). However, the facts and the law must be considered carefully and fully, to the end that a true appraisal be made of the plaintiffs' chances of success upon the issues presented, and a corre-

lative conclusion drawn as to the fairness and reasonableness of the proposed compromise."

See, to the same effect, *Zenn* v. *Anzalone,* 17 Misc. 2d 897 (McGIVERN, J.).

The Court "has apprised himself to all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated * * * to the end that a true appraisal be made of [CCC's] chances of success upon the issues presented, and a correlative conclusion drawn as to the fairness and reasonableness of the proposed compromise."

CCC was created "for the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities * * * and of facilitating the orderly distribution of agricultural commodities" (15 U.S.C. § 714). "[CCC] is an 'agency and instrumentality of the United States within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture.' It was created by Congress to support farm prices and to assist in maintaining and distributing adequate supplies of agricultural commodities. Its capital was provided by congressional appropriation. Any impairment of this capital, which at times has been great due to the nature of its activities, is replaced out of the public treasury; any gains are returned to that treasury" (*Rainwater* v. *U. S.,* 356 U. C. 590, 591-2 [footnotes omitted]).

In the fulfilment of its purposes, CCC was authorized only (so far as is here material) to

> "(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations";

"(d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities";

"(f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities";

"In the Corporation's purchasing and selling operations with respect to agricultural commodities * * * the Corporation shall, to the maximum extent practicable consistent with the fulfillment of the Corporation's purposes and the effective and efficient conduct of its business, utilize the usual and customary channels, facilities, and arrangements of trade and commerce" (15 U. S. C. § 714c).

In the furtherance of such purpose CCC "may make such loans and advances of its funds as are necessary in the conduct of its business" (§ 714b, subd. 2).

The credit regulations issued by the Secretary of Agriculture under the authority of the foregoing statutes (GMS 3) limit the authority of CCC's General Sales Manager to issue letters of credit for periods longer than six or twelve months. This section of the regulations reads:

"§ 1488.3 (c) Criteria for approving longer credit periods: Credit periods beyond 6 or 12 months but not beyond 36 months may be granted by the General Sales Manager in cases where extension of credit will achieve one or more of the following results:

"(1) Permit U. S. exporters to meet credit terms offered by competitors from other Free World countries.

"(2) Prevent a loss or decline in established U. S. commercial export sales caused by non commercial factors.

"(3) Permit U. S. exporters to establish or retain U. S. markets in the face of penetration by Communist suppliers.

"(4) Substitute commercial dollar sales for sales for local currencies and barter transactions.

"(5) Result in a new use of the imported agricultural commodities in the importing country.

"(6) Permit expanded consumption of agricultural commodities in an importing country and thereby increase total commercial sales of agricultural commodities to the importing country by the U. S. and other exporting countries.

In considering applications involving export of commodities to eligible countries in a good financial and balance of payments situation, principal reliance will be placed upon subparagraphs (1), (2), and (3) of this paragraph."

Another section of the regulations reads as follows:

"§1488.8 *Advance payment.* If the exporter receives payment, in whole or in part, from or on behalf of the foreign importer of the principal value of the commodities exported under the credit arrangement prior to maturity of the credit period, he shall remit promptly to CCC such payment received plus interest for the actual credit period utilized."

The claim of CCC herein is based upon 53 irrevocable letters of credit issued by Intra NY, in the aggregate

amount of $21,010,766, in purported compliance with Regulation GMS-3. The affidavit of the Superintendent describes in detail one such transaction. Examination of the documents submitted by the Superintendent satisfies me that this transaction is fairly representative of 51 of the 53 letters. (The records regarding the remaining two, in the aggregate amount of approximately $200,000, are not available.)

The facts stated chronologically, are:

1. On December 7, 1965, Archer Daniels Midland Company ("ADM"), an American exporter, submitted the following application to the General Sales Manager:

> "Subject terms and conditions GMS-3 we hereby make aplication for credit in amount of 3 million dollars for wheat, approximately 1,900,000 bushels, all qualities, for shipment from Gulf and Eastern ports to Lebanon for payment in thirty-six months plus interest. Payment will be assured by an irrevocable letter of credit issued by a qualified United States band in the amount of the purchase price plus interest."

2. The General Sales Manager replied on December 14:

> "Your application dated December 7, 1965 for a CCC credit arrangement of 36 months covering approximately $3,000,000 worth of wheat for export to Lebanon is approved.
>
> "This aproval is subject to the submission to the applicable ASCS Commodity Office of an acceptable assurance of payment from a bank in the United States. A standby type of letter will be acceptable. Purchase of wheat from CCC is to be made within

90 days of the date of this approval. Export of private stocks must take place within 120 days of the date of this approval. For eligible transactions under this credit approval the interest rate will be 5%.

"Your credit approval number is GSM-3108."

3. On January 18, 1966, a Lebanese miller authorized Intra NY to designate ADM as the exporter of certain wheat "covered by letters of credit in your possession received from US Banks or to be received later."

4. On January 20, a Lebanese bank opened an irrevocable letter of credit, confirmed by Chase Manhattan, for the account of the Lebanese miller in favor of Intra NY.

5. On January 21, Intra NY sent ADM a copy of the letter of credit, and advised ADM that, if it supplied the proper documents required in the letters of credit, Intra NY would (a) "establish our letter of credit in favor of CCC for the amount indicated by you, plus 5% interest per annum; and (b) "remit to you the amount representing your cost of handling and freight."

6. On March 9, Intra NY notified ADM that the letter of credit should read "for a period of three years from the date of issuance."

7. On March 29, ADM supplied the requisite documents to Intra NY, including invoices totaling $1,530,979.78, for wheat shipped to Lebanese millers (including the miller specified in items 3 and 4 supra), stating "this shipment was made under CCC Credit Approval GSM-3108." This letter directed that distribution be made by Intra NY by

issuing its letter of credit in favor of CCC for $1,236,216.84, and its check to ADM covering freight and handling charges for $294,762.94, making up the foregoing total of $1,530,979.78.

8. On March 31, the full amount of the foregoing invoices was then drawn down by the American confirming banks under the letters of credit upon the Lebanese issuing banks. On the same day, the $1,530,979.78 was credited to the account of Intra NY in the American banks, and Intra NY credited the account of Intra Beirut on its books in the sum of $1,207,783.85, derived as follows:

Received under letters of credit	$1,530,979.78
Less payments to ADM for handling and freight	294,762.94
Balance	$1,236,216.84
Less Commission to Intra NY	28,432.99
Net Balance	$1,207,783.85

9. On April 4, Intra Beirut wrote to Intra NY authorizing the latter to establish its irrevocable credit in favor of CCC, or account of ADM, in the amount of $1,236,216.84.

10. On the same day, Intra NY issued its irrevocable letter of credit authorizing CCC to draw on Intra NY at sight for account of ADM, up to $1,236,216.84 covering value of agricultural commodities specified. The letter provided:

> "Draft(s) drawn pursuant to this credit must be accompanied by your written statement that the amount due for the commodities plus interest was

not received by you within 36 months effective from weighted average delivery date for each sale, or issuance of export commodity certificates by CCC under Credit Approval No. GSM-3108 issued pursuant to Announcement No. GSM-3.

• • •

"It is a further condition of this credit that CCC will consent in writing to a reduction in the amount of this credit to the extent that CCC applies in satisfaction of the bank's obligation hereunder any payments or credits received for the account of Archer Daniels Midland Co.

"Draft(s) drawn under this irrevocable credit will be duly honored if presented to us on or before 38 months but not earlier than 36 months from the weighted average delivery dates, provided such drawings are further accompanied by your certificate certifying delivery dates of the commodities covered by this credit."

11. At the close of business on March 31, 1966, after giving effect to the credit specified in Paragraph 8 above, Intra Beirut's credit balance in its account in Intra NY was $1,749,306.62. By the close of business on April 11, 1966, payments directed by Intra Beirut had resulted in debits to said account in excess of $1,800,000, and the credit balance was down to $255,251.31.

12. Intra Beirut is also insolvent. CCC filed the same claim in the Lebanese insolvency proceeding, and was allotted proportionate shares of stock in a new company organized by the creditors. It agreed to return such aliquot part of these shares as applied to any recovery it might obtain from Intra NY.

Objectants rely on the dictum in *Massachusetts* v. *United States*, 333 U.S. 611, 627-7:

> "And it is at least doubtful on the [priority] statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency" (footnote omitted here, but discussed *intra*).

They cite cases which disallowed, as contingent or nonmatured on the date of insolvency, claims against guarantors or sureties or insurers. See, *e.g.*, *People* v. *Metropolitan Surety Co. (Fleet)*, 205 N.Y. 135, 139-46 (judgment bond); *id. (H. B. Smith Co.)*, 211 N.Y. 107, 117 (contractor's surety bond pursuant to 32 U.S. Stat. L. 811); *Matter of People (Lexington S. & I. Co.)*, 272 N.Y. 210, 214-5 (bail bond); *People* v. *Commercial Alliance L. Ins. Co.*, 154 N.Y. 95, 98-101 (yearly renewable term life insurance policy); *Frost* v. *Carter*, 1 Johns. Cas. 73, 73 (endorser of promissory note). They also cite cases disallowing claims of lessors for rent occurring after date of insolvency. See, *e.g.*, *Varick Spring Corp.* v. *Bank of United States*, 264 N.Y. 297, 301-3; *Ruppert Realty Corp.* v. *Bank of United States*, 156 Misc. 93, 100-1. Their contention is that the foregoing claims are analogous to the claim of CCC against Intra N.Y.

There are two answers to this contention.

First, the claim of CCC is an obligation which was fixed and had matured on the date when the order of liquidation was entered. Secondly, even if the letters of credit had not yet matured on that date the CCC claim would have to be paid, and would be entitled to priority over all other

creditors, if it matures and becomes fixed in amount prior to the ultimate distribution of the assets.

1. The claim of CCC does not depend solely on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money "under such circumstances that in equity and good conscience [it] ought not to retain it" *(Pink* v. *Title Guarantee & Trust Co., infra)*, and which Intra NY "is obliged by natural justice and equity to refund" *(Bayne* v. *United States, infra)*. That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt, without recourse to the letters of credit. *First Natl. Bank* v. *Mott Iron Works, infra.*

The instant letters of credit do not follow the usual pattern, wherein the issuer becomes liable only if conditions are fulfilled by third parties; and may never become liable if the conditions are not performed, or if someone else pays the holder. When these letters were issued by Intra NY, it had already received full payment therefor, and all the conditions precedent to payment (furnishing of the invoices and the other documents) had been performed.

Nothing remained to be done except payment of the letters of credit by Intra NY, and by it alone. CCC could not demand payment from the Lebanese millers to whom the grain had been delivered, because they had already paid Intra NY. Nor could CCC demand payment from ADM, because it had not received the sale price from anyone, its receipt having been limited to its freight and handling charges.

Such payment was due by Intra NY to CCC immediately, since the former had already received the funds which *ex aequo et bono* belonged to CCC. If ADM had received money from or on behalf of the Lebanese Millers prior to

maturity of the credit period, it would be required to remit such payment *promptly* to CCC. GMS-3, §1488.8, *supra*. No different rule applies where the money was received by Intra NY.

It would appear that CCC was not aware, when it agreed to issue these 36-month letters of credit to ADM, that Intra NY would obtain the money immediately upon shipment of the wheat. The extension of a 36-month credit under such circumstances would have been a clear violation of the above-quoted statutes and regulations. Both Intra NY and Intra Beirut were chargeable with the limitations they imposed on CCC.

In *United States* v. *Remund*, 330 U.S. 539, the Court held that §3466 mandated giving priority, in a state probate proceeding, to a claim asserted by the Farm Credit Administration for unpaid emergency feed and crop loans (48 Stat. 354; id. 1021, 1056). The Court said (p. 543):

> "But it is manifest that the purpose of the Acts [authorizing feed and crop loans to farmers in drought- and storm-stricken areas of the nation] was to give emergency relief to distressed farmers rather than to restore their credit status."

Here it is equally manifest that the purpose of the act creating CCC and the regulations thereunder was to support the prices of agricultural commodities, not to bolster the credit of Intra NY or of Intra Beirut. It would be shocking to all concepts of justice and reason to hold that, after Intra Beirut had lost, dissipated or misappropriated these monies, CCC was remitted to share in a *pro rata* distribution of the assets of the insolvent Intra Beirut, to whom the monies had been transferred without its knowledge or authority.

Appendix A

In *Bayne, et al. Trustees* v. *United States*, 93 U.S. 642, the United States issued a draft to a paymaster in the army. On the basis of that draft, he had a check of $100,000 issued to Bayne & Co. in payment of his personal indebtedness. Bayne became insolvent. In holding that the United States was a preferred creditor for the foregoing $100,000, the Court said, per Davis, J. (p. 643):

> "We are fully satisfied by the proofs that the transactions . . . were the result of a fraudulent purpose to secure the use of the public money to Bayne & Co., who received it with full knowledge that it belonged to the United States, and had been applied in manifest violation of the act of Congress. The law imposes on that firm an obligation, and implies a promise on its part, to refund the money to its owner. Such a promise can be enforced by action. *Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. Moses* v. *Macferlan*, 2 Burr. 1012. Bayne & Co. are indebted to the United States, within the meaning of [R.S. §3466]. The form of their indebtedness, or the mode in which it was incurred, is immaterial. *Lewis, Trustee* v. *United States*, 92 U.S. 618. The government being entitled to a preference and priority of payment from the assets of its insolvent debtors, the relief in this case was, in our opinion, properly granted." (Emphasis Supplied.)

This action of assumpsit for restitution of money had and received has been embodied in our common law at least since the decision of Lord Mansfield in 1760. In that year, the Court of Kings Bench said in *Moses* v. *Macferlan, supra*:

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. * * * In one word, the gist of this kind of action is, that the defendant, under the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

That principle is well established in New York. As was said in *Pink* v. *Title Guarantee & Trust Co.*, 274 N.Y. 167, 173, per Rippey, J.:

"There is no allegation in the complaint that indicates that defendant promised or intended to return the money. In the absence of such an agreement or intention, it is the obligation of defendant which plaintiff asserts and which the law creates to return the money which it procured 'under such circumstances that in equity and good conscience [it] ought not to retain it, and which *ex acquo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it.' (*Miller* v. *Schloss*, 218 N.Y. 400, 407.) As said by this court in that case, that duty rests 'upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.' Independent of any statute, form of action or legal nomenclature, the obligation to do justice rests upon all persons, natural or artificial, and the law will compel restitution from a person who obtains money or property from another fraudulently, unjustly, or without authority. (*Marsh* v. *Fulton County*, 10 Wall. [U.S.] 676, 684; *Salt Lake City* v. *Hollister*, 118 U.S. 256, 263; *Louisiana* v. *Wood*, 102 U.S. 294; *Ward* v. *Love County*, 253

U.S. 17, 24.) It is for the purpose of compelling restitution that this action is brought. (*Wendt* v. *Fischer,* 243 N.Y. 439, 444.)"

See also *Chase Manhattan Bank* (*Nat. Ass'n*) v. *Banque Intra, S.A.,* 274 F. Supp. 496, 499 (S.D.N.Y.).

In *First Natl. Bank* v. *Mott Iron Works,* 258 U.S. 240, Kaiser was a subcontractor for McGhee. Kaiser assigned his contract to the Bank to whom McGhee agreed to make all payments as security for its advances.

Kaiser ordered goods from the Iron Company, which the latter would send only if the Bank guaranteed payment. Thereupon, the Bank gave the guaranty in order to enable Kaiser to complete his contract and to repay the Bank's advances. Subsequently, the Bank allowed McGhee to pay directly to Kaiser monies in excess of the claim of the Iron Company.

In holding the Bank liable on its guaranty, the Court said, per Holmes, J. (p. 241):

"Therefore the bank is in the position of having realized the benefit to acquire which the guaranty was made, and of having realized it out of the proceeds of the goods that it induced the Iron Company to sell.

"In such circumstances, whether the contract is valid or not, the contractor is accountable to the contractee, up to the amount of his undertaking, for the proceeds coming to his hands from the contractee upon the inducement of the contract. *Citizens' Central National Bank* v. *Appleton,* 216 U.S. 196. In this case therefore the plaintiff is entitled to recover the amount for which it has de-

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> cleared, and as the case was fully tried upon the merits, the distinction between a recovery on the guaranty, as having been necessarily incident to the business of banking, and a recovery of the amount received by petitioner on account of the guaranty, becomes purely formal."

This obligation of Intra NY was not released by CCC's acceptance of the 36-month letters of credit under the circumstances previously described. If it be contended that acceptance deferred the time of payment, immediately upon Intra NY's insolvency, its obligation to make restitution of those funds was accelerated, and became a fixed and matured debt on that date.

In *Matter of Empire State Surety Co.*, 214 N.Y. 553, the Court reiterated the principle in the cases cited by objectants, that claims contingent on the date of takeover could not participate in the assets of a statutory liquidation. Nevertheless it held that claims against a liability insurer were not contingent as to "claimants who made settlement of claims brough against them or had judgments rendered against them after the date of the entry of the order of liquidation, although the accidents on which the assured were sued happened prior to the date of the entry of that order" (pp. 563, 570). The Court said, per Seabury, J. (p. 565):

> "When an accident against the consequences of which the assured is insured has happened and suit has been commenced against the assured, the insurer, under the terms of the policy, incurred the obligation of assuming the defense of such a suit. When the insurer violated the contract and refused to defend the suit *or went into liquidation, thus making it impossible for it to undertake the de-*

> *fense of such suit, it incurred a liability which was not contingent* . . . In such a case the liability ceased to be contingent although the amount of the liability may have been unliquidated. The insurer having failed to perform its obligation, the *amount* [italic by the court] of the liability would not become fixed until the loss which the assured sustained was determined, but the liability of the insurer would be certain and not contingent from the moment that it failed to perform its obligation to defend the suit brought against the assured" (other italics supplied).

A subsequent case involving the same liquidation considered claims based on contractors' bonds issued pursuant to 33 U.S. Stat. L. ch. 778. 216 N.Y. 273. The Court reiterated its holding in *People* v. *Metropolitan Surety Co., supra* (211 N.Y. 107), disallowing as contingent "claims upon which no causes of action against the surety had accrued before the date of the entry of the order of liquidation and upon which claims no actions were commenced until after the date of the entry of the order of liquidation" (216 N.Y., at p. 280). But it allowed, as certain and absolute at the date of entry of the order of liquidation, "claims upon which causes of action had accrued and upon which action against the surety had been commenced before * * * the date of the entry of the order of liquidation in which actions judgments on that date had not been entered" (*ibid.*).

Here the obligation of Intra NY to CCC to pay over the monies received from the Lebanese millers is not embodied in an express contract. However, its quasi-contractual obligation to make restitution is equally binding, and came into play when it went into liquidation,

thus making it impossible for it to perform that obligation. The instant case is even stronger than *Empire State Surety* because here the amount of the liability is liquidated.

The contentions that CCC's claim for restitution should be rejected because the issuance of the letters of credit by Intra NY was *ultra vires* has no merit. "* * * [A]lthough restitution of property obtained under a contract which was illegal, because *ultra vires,* cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation" (WHITE, J., in *Rankin* v. *Emigh,* 218 U.S. 27, 35). See, to the same effect, *Citizens' National Bank* v. *Appleton,* 216 U. S. 196, affg. 190 N. Y. 417, 420-2; *Aldrich* v. *Chemical National Bank,* 176 U. S. 618; *American Surety Co.* v. *Phillipine Nat. Bank,* 245 N. Y. 116.

2. The foregoing discussion sufficiently establishes the probability of ultimate success of CCC if its claim went to trial. However, even if objectants should prevail in their contention that CCC has no claim for restitution, but is remitted to claim on its letters of credit, CCC can still show substantial probability of success if the claim will mature and become fixed in amount prior to ultimate distribution of the assets (*Matter of Phillips,* 196 App. Div. 175 [1st Dept.], affd. 232 N. Y. 559; *United States* v. *Knott,* 298 U. S. 554).

Matter of Phillips, supra, involved an insolvent surety company which was taken over for liquidation by the Superintendent of Insurance. The United States filed a claim upon a recognizance for the appearance of a de-

fendant in a criminal trial in the Federal court. The defendant's default occurred *after* the Superintendent's takeover.

The Appellate Division allowed the claim as a preferred claim upon distribution, saying, per SMITH, J. (196 App. Div., at pp. 176-7):

> "Such a claim would still seem to be a contingent claim as it was not even under the common law enforcible, except upon a contingency which did not happen, until after the insolvency of the casualty company. This holding, however, is not here necessary in the view I take of the rights of the government under section 3466 of the United States Revised Statutes [which] gives priority in all cases of insolvency to any obligations due to the United States. That statute has been interpreted by the United States Supreme Court as giving priority even where claims had not matured under the rule adopted by our State. (See *United States* v. *Fisher*, 6 U.S. [2 Cranch] 358; *United States* v. *State Bank of N. C.*, 31 U. S. [6 Pet.] 29; *Field* v. *United States*, 34 U. S. [9 Pet.] 182). The right of the United States government to preference cannot be defeated by any State statute, nor by any rule adopted by the State court. (*Field* v. *U. S.*, 34 U. S. [9 Pet.] 182.)
>
> "Until, therefore, the United States courts or Congress shall establish the rule as held by our State courts and the Legislature as to claims which have matured at the commencement of proceedings for determining the insolvency of the debtor, this court should, I think, give priority as to all claims of the United States government which have matured prior

to the actual distribution of the insolvent's property."

The Court of Appeals answered in the affirmative the fifth certified question, as to whether section 3466 gives the United States the right to share in the assets "on a claim which is contingent at the date of the entry of the order of liquidation but which accrues prior to the distribution of the assets" (232 N. Y., at pp. 560-1).

In *United States* v. *Knott*, 298 U. S. 544, a New Jersey surety company became insolvent, and was taken over for liquidation by that State's Commissioner of Banking and Insurance in 1932. It had issued bail bonds to the United States in Florida. The latter's State Treasurer took possession of the company's securities which had been deposited with him as a condition precedent to doing business there.

The United States claimed priority upon judgments based on entreated bail bonds. A number of these judgments were entered subsequent to 1932, the date of liquidation (Record, pp. 293-6). A Florida statute provided that its courts should distribute the proceeds of the sale of the deposited securities "proportionally among all of the Florida creditors who may make proof of their claims, * * * the surplus, if any, to be disposed of by proper order of such court" (298 U. S., at p. 546). The Supreme Court held that the United States judgments were entitled to priority.

The reason for allowing priority to the claim of the United States, even though founded on a claim which is contingent on the date of insolvency, provided that it becomes fixed prior to distribution, is the strong public policy underlying the priority statute.

"The purpose of this section is 'to secure adequate public revenues to sustain the public burden' (*United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35), and it is to be construed liberally in order to effectuate that purpose" (*United States* v. *Emory,* 314 U. S. 423, 426). "Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466" (*ibid.,* p. 433).

"The words of § 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States" (*United States* v. *Waddill Co.,* 323 U. S. 353, 355). See, to the same effect, *Price* v. *United States,* 269 U. S. 492, 499-500.

It is true that, if the United States were permitted to claim only under the strict terms of the letters of credit, it could not claim its priority under *Phillips* and *Knott* unless the distribution were deferred until after the maturity date of the letters. However, under the circumstances present here, the interests of justice and fair play would dictate that such deferment be directed.

The case at bar is even stronger than *Phillips* and *Knott.* Assuming, *arguendo,* that the claim of the letters of credit had not accelerated on the date of the liquidation order, and had therefore not matured at that time, there is no question but that they were indefeasible obligations which would have to be paid by Intra NY on the stated maturity date.

As already pointed out, Intra NY was the sole obligor, since payment could not be claimed from either the Lebanese millers, who had already made payment, nor from ADM, who had never received payment. Objectants emphasize the recital in the letters that CCC would consent

"to a reduction in the amount of this credit to the extent that CCC applies in satisfaction of the bank's obligations hereunder any payments or credits received for the account of [ADM]." But it is clear that CCC would not receive payments or credits from any other source, since such payments had already been made to Intra NY.

Massachusetts v. *United States*, 333 U. S. 611, involved an assignment for the benefit of creditors. The United States claimed priority for unemployment compensation taxes due under Title 9 of the Social Security Act.

That statute provided that the taxpayer might credit, against 90% of such tax, the amount of contributions paid by him into a state unemployment insurance fund (42 U.S.C. § 902, now 26 U.S.C. § 3302). The assignee had exercised that option by making contributions to the Massachusetts fund. Nevertheless, the Court sustained the § 3346 priority, and directed reimbursement from Massachusetts of those contributions.

In that case, the fund was not large enough to pay all the federal claims in full. The Government apparently conceded that, if a balance remained after paying all of the claims, "the insolvent taxpayer is nevertheless given the right by §902 to pay that balance to the state and receive credit on his federal Title 9 tax. In such a case, it is said, the Government would be overpaid on Title 9 taxes and obligated to refund the excess. Then the taxpayer could apply the amount received in further payment of the state claim, with corresponding federal credit, overpayment and refund, only to start the cycle again and repeat it until he had paid the state its claim in full and received the entire 90 per cent credit" (p. 624, footnote omitted).

The Court pointed out that this concession would cut the ground from beneath the Government's basic position. The Court said, per Rutledge, J. (pp. 625-6):

> "Rev. Stat. §3466 gives priority explicitly for '*debts* due to the United States' and the priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive [italics in original].
>
> • • •
>
> "But if credit can be taken after §3466 attaches, i.e., after insolvency, effective to set aside the federal priority up to 90 per cent of the Title 9 claim, the priority to that extent becomes conditional, not absolute. Its effectiveness then becomes contingent upon the happening of subsequent events, namely, the concurrence of the conditions of §902 for paying the state and taking the credit together with the taxpayer's election to do this. In short, §3466 never conclusively attached and §902 works retroactively on occurrence of those contingencies to upset the priority."

The Court then proceeded to make the statement so heavily relied on by objectants (pp. 626-7):

> "A further effect might be to make the statute applicable beyond the scope of the term 'debts due to the United States.' For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the 'debt' itself becomes contingent. And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.[26] "

Appendix A

The material portion of footnote 26 reads:

> "But the fact that the problem has not squarely arisen in the long history of §3466 and that all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, *viz.*, that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of 'debt' as distinguished from other forms of obligation."

The foregoing analysis shows how remote from the instant problem is the dictum in *Massachusetts* v. *United States*. The *holding* there was that the debt due the United States under Title 9 of the Social Security Act (42 U.S.C. § 901, now 26 U.S.C. § 3301) became "final and conclusive" on the date of insolvency, and could not be defeated by the taxpayer's subsequent exercise of his option under section 902. The debt due CCC here was "final and conclusive" on the date of insolvency if based on the theory of restitution. It was equally "final and conclusive" on that date if based on the express contract embodied in the letters of credit, even if it be assumed *arguendo* that CCC might have to await payment until the stipulated maturity date. There was no possibility of defeasance of that obligation here, similar to that embodied in the government's concession in the cited case.

The conclusion reached herein is not in conflict with *United States* v. *Marxen*, 307 U. S. 200. The United States there claimed priority in a bankruptcy proceeding on the basis of a note of the bankrupt to a bank which had been insured by the F.H.A., which the bank had assigned to

the latter upon receiving reimbursement. The assignment took place after the bankruptcy petition.

In answering a certified question, the Court held "that § 3466 is inapplicable to general claims in bankruptcy transferred to the United States * * * after the filing of the petition for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy" (p. 207).

The Court emphasized the narrow rationale of its decision, saying, per REED, J. (p. 205):

> "As the certificate does not show the State in which the note was executed, payable or enforceable, we are left to speculate as to the applicable law of indemnity. It is not clear that a voluntary guarantor can recover in every jurisdiction from the involuntary principal who has not requested the service. But even if we assume that such a guarantor may recover upon an implied promise of reimbursement, the rule is not effective here. The statement of the case and the question certified show that the claim in bankruptcy of the Government is based upon the note, duly assigned to it after bankruptcy. As no proof was made of any claim for reimbursement, such a claim is not involved" (footnotes omitted).

Two other contentions made by objectants may be briefly disposed of.

First, it is contended that the Superintendent, in his supervisory capacity, was negligent in that his examinations should have disclosed that Intra NY had issued letters of credit to CCC which were far in excess of the bank's capital, and should have stopped this practice.

There is no proof that the Superintendent's examination did disclose or should have disclosed this fact. In any event, it is of no legal consequence. If it be assumed that the Superintendent was thus negligent in his supervisory capacity, that would not defeat the rights of the bank's creditors for whom he is acting in a fiduciary capacity.

Secondly, it is pointed out that the Superintendent initially rejected CCC's claim. His initial reaction is understandable, in view of the complexity of the transactions and the necessity to ferret out all the essential facts. However, the Superintendent had the right to change his mind if a complete investigation satisfied him that there was enough probable success of CCC's claim to warrant making this settlement, which assured payment in full to other creditors who would receive nothing if CCC's claim were ultimately adjudged valid.

The result reached herein conforms to one's natural sense of fairness and equity. There can be little question but that, as between CCC on the one hand, and shareholders of Intra NY and creditors who claim in subordination to them on the other hand, the claim of CCC is superior.

It may be pointed out further that, if CCC's claim were invalidated herein on the sole ground that it had not matured on the date of the entry of the order of liquidation, it does not follow that any surplus in the Superintendent's hands would be remitted to Intra Beirut.

CCC, as a creditor, could bring an action in the Federal court to obtain payment from Intra NY, and could attach the latter's assets in the Superintendent's hands. The decision of Steuer, J. in *Guaranty Trust Co.* v. *Bell*, 182 Misc. 372 (cited by objectants), holds that assets in the

Superintendent's possession cannot be attached by one creditor if thereby he would obtain preference over other creditors. It has no application to an attachment by a creditor which prevents turning assets over to shareholders.

Such an action by CCC in the Federal court would be determined by United States law, rather than by Lebanese law (*Harrison* v. *Sterry,* 5 Cranch [9 U. S.] 289, 298-9). And in such action, Federal law, rather than State law, would apply (*United States* v. *L. N. White and Company,* 359 F. 2d 703, 714, note 16 [2d Cir.], and cases cited therein; *Cargill, Incorporated* v. *Commodity Credit Corporation,* 275 F. 2d 745, 751 [2d Cir.].

Accordingly, the Superintendent's motion for approval of the proposed compromise is granted. Settle order.

Dated, June 12, 1968

WCH
J.S.C.

APPENDIX B

United States Constitution

AMENDMENT V

88th Congress Senate Document 39, pp. 58-9.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IV—SECTION 1

88th Congress Senate Doçument 39, pp. 63-5.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

31 USC Sec. 191

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators,

is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

62 Stat. 1074
15 U.S.C. Sec. 714b (a-g)

GENERAL POWERS OF CORPORATION

The Corporation—

(a) Shall have succession in its corporate name.

(b) May adopt, alter, and use a corporate seal, which shall be judicially noticed.

(c) May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. The district courts of the United States including the district courts of any Territory or possession shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation: *Provided,* That the Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest. Any suit against the Corporation shall be brought in the District of Columbia, or in the district wherein the plaintiff resides or is engaged in business. No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within

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six years after the right accrued on which suit is brought, or (2) in the event that the person bringing such suit shall have been under legal disability or beyond the seas at the time the right accrued, the suit shall have been brought within three years after the disability shall have ceased or within six years after the right accrued on which suit is brought, whichever period is longer. The defendant in any suit by or against the Corporation may plead, by way of set-off or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: *Provided,* that the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. All suits against the Corporation shall be tried by the court without a jury. Notwithstanding any other provision of sections 714-714*o* of this title, the Federal Tort Claims Act shall be applicable to the Corporation. Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of subsection (c) of this section to the same extent as though such suit were by or against the Corporation, except that if any such suit against the United States based upon any claim of the type enumerated in section 1491 of Title 28, may be brought in the United States Court of Claims, and (2) no such suit against the United States may be brought in a district court unless such suit might, without regard to the provisions of sections 714-741*o* of this title, be brought in such court.

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(d) May adopt, amend, and repeal bylaws, rules and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised.

(e) Shall have all the rights, privileges, and immunities of the United States with respect to the right to priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors. The Corporation may assert such rights, privileges, and immunities in any suit, action, or proceeding.

(f) Shall be entitled to the use of the United States mails in the same manner and upon the same conditions as the executive departments of the Federal Government.

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. State and local regulatary laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements.

REGULATIONS OF THE COMMODITY CREDIT CORPORATION

FR Document 66-1876
7 CFR § 1488.1 et seq.

GSM-3, Revision II

TITLE 7—AGRICULTURE

Chapter XIV—Commodity Credit Corporation, Department of Agriculture

Subchapter C—Export Programs

Appendix B

PART 1488—SALES OF AGRICULTURE COMMODITIES

Subpart A—Sales of Agricultural Commodities Under CCC Export Credit Sales Program (GSM-3, Revision II)

Sec.

1488.1 General statement.

1488.2 Definition of terms.

1488.3 Submission of applications for a credit approval.

1488.4 Coverage of bank obligations.

1488.5 Interest.

1488.6 Special conditions applicable to cotton exported from private stocks.

1488.7 Expiration of period for purchases from CCC or exports from private stocks.

1488.8 Advance payment.

1488.9 Purchases of commodities from CCC inventory and tobacco under CCC loan.

1488.10 Issuance of certificates in advance of exportation of private stocks.

1488.11 Issuance of certificates after export of private stocks.

1488.12 ASCS offices responsible for issuing certificates.

1488.13 Evidence of export of private stocks and warranty.

1488.14 Evidence of entry into country of destination.

1488.15 Liability for payment.

1488.16 Assignment.

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1488.17 Covenant against contingent fees.

1488.18 Shipment of commodities on vessels calling at Cuban ports.

1488.19 Officials not to benefit.

1488.20 Nonuse of Government financing.

1488.21 Exporter's records and accounts.

1488.22 Communications.

AUTHORITY: The provisions of this Subpart A issued under sec. 5(f) 62 Stat. 1072, 15 U.S.C., 714a; sec. 407, 62 Stat. 1055 as amended, 7 U.S.C. 1427.

§ 1488.1 GENERAL STATEMENT.

(a) The regulations contained in this subpart A supersede Announcement GSM-3, Revision I, and set forth the terms and conditions governing the CCC Export Credit Sales Program. The maximum credit period shall be 3 years.

(b) Upon issuance of a credit approval the exporter may, but will not be obligated to make purchases of eligible commodities from CCC stocks or shipments of private stocks in accordance with the applicable credit arrangement. CCC does not guarantee that it will have stocks of the desired commodities available. CCC reserves the right to restrict the exporter to either purchases from CCC or exportation from private stocks by so specifying in the credit approval. Unless so restricted, exporters may acquire the commodities from CCC inventories (including tobacco pledged as security for a CCC loan) for

exportation hereunder or may elect to export commodities from private stocks even though the commodity is available from CCC inventory (or in the case of tobacco, pledged as security for a CCC loan). If an exporter, elects to export from private stocks, CCC, upon the terms and conditions hereinafter set forth in this subpart, will issue to the exporter an Export Commodity Certificate (Form CCC-341) in a dollar amount equal to the U.S. port value for commodities exported or to be exported from private stocks. Such certificate may be transferred and may be used in the purchase of commodities for export pursuant to the terms and conditions of announcements issued by CCC providing for the redemption of such certificates.

(c) The provisions of Public Law 83-664 are not applicable to export shipments under this program.

§ 1488.2 Definition of terms.

Terms used in this subpart are defined as follows:

(a) "CCC" shall mean the Commodity Credit Corporation, U.S. Department of Agriculture.

(b) "ASCS office" shall mean the designed office of the Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture.

(c) "FAS" shall mean the Foreign Agricultural Service, U.S. Department of Agriculture.

(d) "Credit arrangement" shall mean and include the terms and conditions of the regulations of this subpart and any amendments thereto; the exporter's application

for and the issuance of a credit approval by the General Sales Manager or the appropriate ASCS office.

(e) "Eligible commodities" shall mean those agricultural commodities which are produced in the United States and which are designated as eligible for export under this credit sales program either in the CCC Monthly Sales List or other announcement by CCC in effect for the calendar month in which a credit arrangement is made.

(f) "Private stocks" shall mean those quantities of an eligible commodity which have not been acquired by the exporter, or any of his predecessors in title, from stocks owned by CCC or from stocks of tobacco pledged as security for a loan to CCC, unless such quantities were acquired from such stocks under a contract, regulation, or announcement (1) which does not restrict the use or disposition of the commodity or (2) which requires the commodity so acquired, or a substitute commodity, to be exported and the substitute commodity has been or will be exported as so required. Such substitute commodities shall not be considered private stocks.

(g) "Eligible exporter" shall mean a person (1) who is regularly engaged in the business of buying or selling commodities and for this purpose maintains a bona fide business office in the United States, its territories or possessions, and has someone upon whom service of judicial process may be had within the United States, (2) who is financially responsible, and (3) who is not suspended or debarred from contracting with or participating in any program financed by CCC on the date of approval of his application hereunder.

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(h) "Eligible destination" shall mean the country which is named in the CCC credit arrangement and which meets the licensing requirements of the U. S. Department of Commerce.

(i) "Certificate" shall mean an Export Commodity Certificate Form CCC-341.

(j) "Port value" shall mean the exporter's sales price of the commodity basis f.a.s. or f.o.b. export carrier at U.S. ports, at U.S. border points of exit or, if transshipped through Canada via the Great Lakes, at ports on the St. Lawrence River, for shipment from private stocks to be exported under this program. In the case of c&f and cif sales the port value shall not include the ocean freight (c&f) or ocean freight and marine and war risk insurance (cif).

(k) "Purchase price" shall mean the value of the commodities obtained from CCC to be applied to the credit arrangement as determined by CCC or as provided under the applicable commodity export sales announcement.

(l) "Principal value" shall mean the purchase price of the commodities obtained from CCC or the port value in the case of private stocks for which certificates are issued.

(m) "Political risks" shall mean risk of loss due to (1) inability of the foreign bank, through no fault of its own to convert foreign currency to dollars, or (2) nondelivery of the commodity covered by a credit arrangement into the eligible destination through no fault of the foreign bank or importer or exporter because of the cancellation of previously issued and valid authority to im-